No. 80-2109

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EMMETT M. CLARK, JAMES A. DORSEY,
A.D. McLANE, RICHARD CUBBAGE, AND
JOHN G. TERHUNE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether the United States Court of Claims erred in dismissing, for lack of jurisdiction, petitioners' action against the United States for damages because of an unconstitutional classification for receiving certain federal payments.

The five petitioners commenced this action in the United States District Court, but on appeal the United States Court of Appeals for the Seventh Circuit, at the request, after oral argument, of counsel for the United States, ruled that Congress had intended jurisdiction for this type of action to be exclusively in the Court of Claims, and ordered transfer of this case.

In the further proceedings counsel for the United States then argued that the Court of Claims did not have jurisdiction, and that court has adopted that position. Only this Court can resolve this conflict between the United States Court of Appeals and the Court of Claims.

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The five petitioners herein respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Claims entered in this proceeding on February 6, 1981.

This case falls directly within the reason for review on Writ of Certiorari set

out in Rule 17 (a) of the Rules of the Supreme Court effective June 30, 1980, because the Court of Claims "has rendered a decision in conflict with the decision of a federal court of appeals on the same matter," And here it is also in the same case, with the same parties.

Petitioners respectfully submit that, as contemplated by Supreme Court Rule 23.1, this Court can make a "summary disposition" and determine whether the Court of Claims or the Federal District Court should take jurisdiction of petitioners' complaint, without burdening this Court with arguments or further briefs.

OPINION BELOW

A copy of the opinion of the United States Court of Claims dismissing petitioners' action for want of jurisdiction is included as Appendix A.

JURISDICTION

Jurisdiction in this cause is premised on 28 U.S.C. Sec. 1255, providing for review by writ of certiorari of a decision of the United States Court of Claims.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are in 28 U.S.C. Sec. 1491, providing jurisdiction to the Court of Claims when the constitutionality of an Act of Congress is challenged.

STATEMENT OF THE CASE

The only matter here presented is which court, the Court of Claims or the United States Court of Appeals for the Seventh Circuit, was correct on the question of jurisdiction to hear petitioners' case on its merits. The two decisions are directly in conflict. The merits were not considered by either court, and are not involved in this petition, but the substantive issue present-

ed is one of great significance.

Petitioners commenced this action in the federal District Court, showing that Congress had recognized the problems for retirees trying to live on pensions fixed at the time they retired. It passed laws providing additional amounts payable from general federal revenues. There was no legal obligation on Congress to provide such extra payments, but only certain groups were chosen for this important protection. Petitioners sought to show that a discriminatory classification, contrary to the protection of the Fifth Amendment, resulted from this action, and argued that 28 U.S.C. Sec. 1331 provided jurisdiction to consider their complaint.

That Section provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity

The United States Court of Appeals concluded, at the request of counsel for the United States, that sole jurisdiction of such cases is in the Court of Claims, under 28 U.S.C. Sec. 1491 which provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress...."

In its opinion in the present case, Clark v. United States, 596 F 2d 252, 253-4, the Court of Appeals said:

> "the basis of their suit...mandates compensation from the federal Government for the damages sustained in violating the fifth amendment...Section 1491 provides the forum in which plaintiffs may present their damage case on its merits."

And in a footnote, pp 254, the Court of Appeals emphasized that Congress intended such matters to be presented to the Court of Claims, stating

> "Such a suit is of course within the jurisdiction of the Court of Claims..." citing United States v. Testan 424 U.S. 392 (1976)

Petitioners did not contest this transfer of their case to the Court of Claims,

thinking this was the law and that defendant United States wanted to test the merits of plaintiffs' claim in that forum. But to the surprise and distress of petitioners, defendant then moved for dismissal from the Court of Claims on the ground it really didn't have jurisdiction of our case after all, and that court granted the Motion to Dismiss. (App. A)

REASONS FOR GRANTING THE WRIT

This Court has decided that a forum must exist when such a constitutional challenge to an Act of Congress is brought. Califano v. Sanders 430 U.S.99, 109 concluded

> "When constitutional questions are in issue, the availability of judicial review is presumed."

To the same effect is Weinberger v. Salfi 422 U.S. 749, 762 (1975). Any other conclusion would mean Congress could enact unconstitutional statutes, and then withdraw all right to test them. This Court has never reached a conclusion that would leave plain-

tiffs without any means to contest the constitutionality of an Act of Congress, when, as here, they have standing to sue, and have a direct interest not shared by the public in general.

Since we should assume Congress intended to permit a test of the constitutionality of statutes such as here involved, this leaves the question of which court was to have jurisdiction. The United States Court of Appeals in the present case seemed certain that jurisdiction was in the Court of Claims. And although Sec. 1491 is broad in terms, the Court of Claims has adopted a restrictive interpretation of their jurisdiction, which excludes all

> "claims based on the equal protection clause incorporated in the Fifth Amendment or on the due process clauses of that amendment, because these constitutional provisions do not obligate the Government to pay money damages." App A,pp2

The basis given for this restrictive rule is United States v. Testan, 424 U.S. 392 (1976). No other cases, outside of three

recent self serving opinions of the Court of Claims itself, are relied on. Thus this Court need consider only the merits of petitioners' request and this Court's action in Testan to determine whether the Court of Claims has taken too restrictive a view of its jurisdiction.

Testan was an action by several government attorneys seeking reclassification and back pay for a higher grade. The question there was whether the federal statutes invoked confered a substantive right to recover money damages from the United States. No question was presented as to whether the Fifth Amendment of the Constitution could be the basis for money payments. The Court of Claims decision herein states that Testan holds that the Constitution only creates a cause of action for money damages if that basis "in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." (401-2) But as ruled in decisions of this Court, in-

cluding those hereinafter cited, sometimes it can be shown that the constitution does mandate such compensation by the Federal Government.

Testan holds that plaintiffs must show a money claim under a statute or constitutional provision. And that is exactly what petitioners can and will do when this case is presented on its merits. Testan provides no basis for the Court of Claims self imposed rule that under no circumstances could the Fifth Amendment protection against wrongful discrimination result in payments by the United States, so that no such cases can even be considered on their merits.

Yet Testan is the case relied on by the Court of Claims. Petitioners are seeking damages, and it is well established in this Court that when a plaintiff shows that a federal statute creates an unconstitutional classification under the Fifth Amendment, this Court requires payments from the government to the plaintiffs to overcome the dis-

crimination. In other words, this Court has decided that it can be shown that the Fifth Amendment due process protection does require payments to those unlawfully discriminated against, even when Congress did not intend such payments. Thus the Fifth Amendment protection "can fairly be interpreted as mandating compensation by the Federal Government," in some cases.

Examples of decisions by the Supreme Court, holding that the Constitution required federal payments, not authorized by Congress, to overcome an unconstitutional discrimination in classification, such as here presented, include:

Frontiero v. Richardson, 411 U.S. 677 (1973) where an air force officer sought benefits for her husband not provided in the law. The statute was found to violate the Due Process Clause of the Fifth Amendment, and this Court ordered payments not provided by Congress, in order to overcome the unconstitutional classification.

Califano v. Goldfarb, 430 U.S. 199 (1977) where an unconstitutional discrimination under the Due Process Clause was found, and federal payments required to those discriminated against. As observed by the District Court in that same case, "..the court is creating a new class of beneficiaries which Congress did not create." 396 F. Supp 308, 309

Jiminez v. Weinberger, 417 U.S. 628, 637, (1974) where benefit payments to certain illegitimate children were barred when the children had not lived with the parents. This Court found the classification limitation as to who should receive such payments unconstitutional, and ordered payments also to those, like petitioners here, who had been discriminated against by the statutory selection.

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) where Congress excluded from Social Security benefits certain persons because of credits under the law earned by their spouses. This Court, based on the Fifth Amendment protection, ordered that payments from the

government also be made to plaintiffs to overcome the discrimination.

Jacobs v. United States, 290 U.S. 13, 16 (1933) which was a suit for payments by the government, and the rule was stated that:

> "The suits were thus founded upon the Constitution of the United States"and the remedy "rested upon the fifth amendment" so that "a promise to pay was not necessary."

In these and many other cases payments were ordered by the courts to overcome the discrimination in classification, and the basis for the power to do this is the Constitution - which mandates such additional payments in such instances of discrimination. While individual federal administrators usually were named as defendants in such cases, it was known and accepted by all parties that the payments in each case, required by the Fifth Amendment, would be made by the United States. And the only basis for payments to those discriminated against was that the Constitution, Fifth Amendment, required and mandated them. No statute provided for

them; no contract provided for them; and no tort principle was involved. In other words, this Court has repeatedly required payments to those who were omitted by Congress from protected groups, contrary to the Fifth Amendment protection against discrimination.

In Weinberger v. Salfi 422 U.S. 749 (1974) this Court analyzed the principles here involved. It stated that a statutory classification in the area of social benefits must be "rationally based and free from invidious discrimination" to meet the requirement of the due process clause of the Fifth Amendment, or in case of a state statute, the Fourteenth Amendment, Equal Protection Clause. pp 770. Claims to receive funds from the public treasury must be based on an invidious discrimination or criteria which bear no rational relation to a legitimate legislative goal. Petitioners should be "free to present evidence.." and present their constitutional claim that the classification "is not so rationally related to a legitimate legislative objective

that it can be used to deprive them of benefits available to those who do satisfy that test." pp. 772.

But the Court of Claims, without commenting on this well established rule of this Court, has none the less decided there is no possible way it can be shown that the Fifth Amendment Due Process clause "expressly or by implication" can provide the basis for payments by the United States to a plaintiff. It should be noted that the prior cases where the Court of Claims stated its general rule all involved claims for damages because of administrative actions, which were in the nature of tort actions, which have long been outside the jurisdiction of the Court of Claims. The present case is the first time that court has refused jurisdiction when plaintiffs' case was based on an unlawful classification in an Act of Congress, contrary to the Fifth Amendment Due Process protection.

This arbitrary restriction by the Court of Claims of its jurisdiction is not supported by the decision of this court in Testan relied on, or any other decision by this Court. And it is contrary to the above cited decisions which rely on the Fifth Amendment protection of the Constitution against discrimination in classification in requiring payments to plaintiffs who were unconstitutionally excluded by Congress from the benefit programs considered.

Petitioners urge this Court to remove the conflict in holdings of the United States Court of Appeals and the Court of Claims. The statute itself, Sec. 1491, expresses no such arbitrary limitation as imposed by the Court of Claims, and by its broad terms comtemplates actions such as here for damages arising from violation of constitutional rights.

CONCLUSION

In conclusion, petitioners request a summary order from this Court requiring the Court of Claims to hear petitioners' case on its merits, or in the alternative, petitioners request the granting of this Petition so that full consideration and resolution can be made of the question of where petitioners' action can be brought.

Respectfully submitted,

Richard T. Cubbage
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Evanston, IL 60203

Counsel for Petitioners

June, 1981

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 256-79 C

EMMETT M. CLARK, et al.	Civilian Pay; Constitutional Law; The Equal Protection of the Laws Clause; Lack of Jurisdiction.
v.	
THE UNITED STATES	

Richard T. Cubbage, attorney of record, for plaintiffs.

Nancy R. Sills, with whom was Assistant Attorney General Alice Daniel, for defendant.

Before KUNZIG, Judge, Presiding, COWEN, Senior Judge, SMITH, Judge.

ORDER

Plaintiffs are five non-Federal retired persons. Three of them receive a Railroad Retirement annuity and a corporate pension; the fourth receives a pension under a state employees' pension plan, and the fifth re-

ceives a pension under a state teachers' retirement system. Plaintiffs commenced their action by a complaint filed in the United States District Court for the Northern District of Illinois. In substance, they claim that the cost-of-living increases for Federal Civil Service retirees under 5 U.S.C. sec. 8340, violate the equal protection clause embodied in the due process clause of the Fifth Amendment, unless similar increases are added to their private or state pensions. In the District Court, they sought declaratory relief, as well as retroactive and future additional monthly payments so that the purchasing power of their pensions would equal that provided the retired employees of the Federal Government. The amount in controversy exceeds $10,000.

The District Court found that it had jurisdiction under 28 U.S.C. sec. 1331(a), but in a decision on the merits, concluded that the complaint should be dismissed on the grounds

that there was a rational basis for the statute and that it was free from invidious discrimination. Clark v. United States, 447 F. Supp. 172 (N.D. ILL. 1978).

Plaintiffs appealed, and the case was orally argued before a panel of the Seventh Circuit. After oral argument, the United States attorney sent a letter to the court, stating that there was "a serious question whether plaintiffs' complaint should have been filed in the Court of Claims." He cited Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978). Plaintiffs' counsel did not answer that letter. The Seventh Circuit held that the District Court had no jurisdiction under 28 U.S. C. sec. 1331(a) and concluded that since plaintiffs' prayer for declaratory relief was mingled with a damage claim in excess of $10,000, the only proper jurisdiction was in the Court of Claims under 28 U.S.C. sec. 1491. Acccrdingly, the court issued an order vacating the District Court's judgment and ordering

that court to transfer the case to the Court of Claims. Clark, et al. v. United States, 596 F.2d 252 (7th Cir. 1979).

Following the transfer of the case to this court, plaintiffs filed a motion for summary judgment. Defendant responded with a motion for judgment on the pleadings and a cross-motion for summary judgment. Citing decisions of the Supreme Court and of this court in support of its position, the Government urges us to dismiss plaintiffs' petition on the ground that plaintiffs have failed to state a claim within the jurisdiction of this court.

Although it is a regrettable decision under the circumstances, we have no option but to grant defendant's motion to dismiss for lack of jurisdiction over claims based on the equal protection clause incorporated in the Fifth Amendment or on the due process clause of that amendment, because these constitutional provisions do not obligate the

Government to pay money damages. Carruth v. United States, __ Ct. Cl. __, 627 F.2d 1068 (1980); Walton v. United States, 213 Ct. Cl. 755 (1977); Muehlen v. United States, 209 Ct. Cl. 690 (1976); Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967).

Citing the Eastport case, the Supreme Court in United States v. Testan, 424 U.S. 392 (1976) declared that where "the plaintiff is not suing (the United States) for money improperly exacted or retained, the basis of the federal claim -- whether it be the Constitution, a statute, or a regulation -- does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis 'in itself***can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" (424 U.S. at 401-02.)

Plaintiffs' case clearly falls within this category. Moreover, this case is unlike Gentry v. United States, 212 Ct. Cl. 1, 547

F.2d 343 (1976), where we held that an unconstitutional provision of the Civil Service Retirement Act could be severed from the balance of the Act and a money judgment could be rendered in favor of plaintiffs based upon the remaining constitutional portion of the statute. Plaintiffs do not claim that Gentry is applicable here and could not do so, because there is no severable valid statute upon which the court could render a money judgment in their favor if they were entitled to prevail on the merits.

The court takes this occasion to point out that this is one of several cases beyond our jurisdiction which have been transferred to this court from other Federal courts in reliance, at least in part, on a motion or suggestion by a United States attorney that the Court of Claims had jurisdiction of the case. In the nature of their work, United States attorneys probably have little occasion to familiarize themselves with this

court's jurisdiction and apparently no specific action has been taken by the Department of Justice to acquaint them with the limits of our jurisdiction. The unfortunate result in situations like that in this case is not only a waste of judicial time but a useless expenditure of time and money on the part of the involved plaintiffs and their attorneys. Although few in number, these regrettable instances detract from the generally fair and creditable manner in which the Department of Justice represents the Government in this court. We suggest, therefore, that the Department of Justice should take appropriate action to insure that the United States attorneys and their staffs are familiar with the limitations upon our jurisdiction. To avoid recurrences of the situation in this case in the future, the Department might wish to consider requiring the United States attorneys to check with the Civil Division before taking the position that a district

court case is within the exclusive jurisdiction of this court.

IT IS THEREFORE ORDERED, that defendant's motion for judgment on the pleadings is granted; plaintiffs' motion for summary judgment is denied, and plaintiffs' petition is dismissed.

BY THE COURT

ROBERT L. KUNZIG
Judge, Presiding

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EMMETT M. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners receive railroad retirement, private, or state pensions. They contend that 5 U.S.C. 8340, which provides that persons receiving federal civil service pensions are entitled to regular cost-of-living increases, is unconstitutional because it does not provide similar cost-of-living increases for private and state pensioners. They seek review of the decision of the Court of Claims that it lacks jurisdiction of this case.

1. *a.* Petitioners first filed suit in the United States District Court for the Northern District of Illinois, alleging that 5 U.S.C. 8340 violates the equal protection requirements of the Due Process Clause of the Fifth Amendment because the statute distinguishes between persons receiving federal civil service pensions and those receiving other kinds of pensions. They argued that it is unfair for the United States

to provide cost-of-living adjustments for its former employees and deny such adjustments to people receiving other kinds of pensions, but who suffer from the effects of inflation. Petitioners sought declaratory relief and an order requiring the United States to pay them retroactively and for the future such additional monthly amounts as may be required to give them cost-of-living indexing rights equivalent to those of federal civil service retirees. See Pet. App. 2.

The district court rejected petitioners' equal protection claim on the merits. *Clark* v. *United States*, 447 F. Supp. 172, 177-178 (N.D.Ill. 1978), vacated, 596 F. 2d 252 (7th Cir. 1979). Since the challenged statute created no suspect classification, the only question was whether the statutory classification was irrational. The court concluded that "[i]t simply makes no sense to urge" that the distinction between former government employees and others is irrational. 447 F. Supp. at 178.

On appeal, the Seventh Circuit vacated the judgment and remanded the case to the district court, with directions to transfer the case to the Court of Claims. 596 F. 2d 252. In the view of the court of appeals, petitioners sought money rather than injunctive relief, and therefore only the Court of Claims had jurisdiction of the claim.

b. The Court of Claims held that petitioners' claim was not "founded * * * upon the Constitution" within the meaning of 28 U.S.C. 1491 since the claim was based on the equal protection component of the Fifth Amendment, which does not require the government to pay money damages (Pet. App. 4-5). The court, therefore, dismissed the case for lack of jurisdiction.

2. The apparent conflict between the Seventh Circuit and the Court of Claims concerning the scope of 28 U.S.C. 1491 may eventually require resolution in this Court. This is

not an appropriate case for doing so.[1] Petitioners' claim is so plainly insubstantial that it would have been proper for either the court of appeals or the Court of Claims to dismiss it for lack of jurisdiction on that ground. See, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528, 536-543 (1974); *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946).

Petitioners assert that the United States may not constitutionally adjust the pensions that it pays its retired employees to compensate for inflation unless it also makes payments out of the treasury to those like petitioners who receive private or state pensions. Petitioners are not similarly situated to federal civil service retirees:

> Regarding conditions of employment, including pension benefits, federal employees are in a class separate from other citizens. The United States as their employer has special obligations to them alone. In determining those conditions of employment, the United States, like all other employers, including those of [petitioners], is acting in a proprietary capacity. The fact that [petitioners] happen to be pensioners, therefore, does not constitute a basis for maintaining that they are entitled to the same benefits provided by the federal government to its retired employees.

Clark v. *United States, supra*, 447 F. Supp. at 177-178. The distinction recognized in Section 8340 between former federal employees and petitioners is, therefore, perfectly reasonable and plainly does not violate the equal protection component of the Fifth Amendment. *E.g.*, *Schweiker* v. *Wilson*, No. 79-1380 (Mar. 4, 1981), slip op. 16-18; *United States Railroad Retirement Board* v. *Fritz*, No. 79-870

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[1]The conflict may, of course, resolve itself. There is no reason to assume that the Seventh Circuit will persist in its view that the Court of Claims has jurisdiction in this case in light of the Court of Claims' ruling on the question.

(Dec. 9, 1980), slip op. 11-12; *Califano* v. *Boles*, 443 U.S. 282, 293 (1979); *Califano* v. *Aznavorian*, 439 U.S. 170, 174-175 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

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